

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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|---------------------------|---|-----------------------|
| STATE OF WASHINGTON, |) | |
| |) | No. 59146-1-I |
| Respondent, |) | |
| |) | |
| v. |) | |
| |) | DIVISION ONE |
| MICHAEL SCOTT LATOURETTE, |) | |
| |) | |
| Appellant, |) | |
| |) | UNPUBLISHED OPINION |
| and AUSTIN JAMES DERBY, |) | |
| and each of them, |) | |
| |) | |
| Defendant. |) | FILED: August 9, 2010 |

Leach, A.C.J. — Michael LaTourette appeals his convictions for robbery, attempted kidnapping and assault, arguing that the State failed to present sufficient evidence to support the convictions and that the trial court abused its discretion by failing to decide his motion for a new trial. He also challenges his sentence, arguing that his crimes involved the same criminal conduct for purposes of his offender score and that the trial court imposed firearm sentencing enhancements in violation of his constitutional right to a jury trial. Because the State presented sufficient evidence to support the convictions and the trial court did not abuse its discretion in denying his motion for an additional continuance to properly file and note his post-trial motions eleven months after the verdict, we

affirm the convictions. Because the jury found that LaTourette was armed with a deadly weapon, and not a firearm, the trial court only had authority to impose deadly weapon enhancements and not the longer firearm enhancements. We remand for resentencing consistent with this opinion.

FACTS

Based on incidents occurring in the early morning hours of May 30, 2004, the State charged Michael LaTourette with first degree robbery, attempted first degree kidnapping, and second degree assault. At trial, Azazi Yohannes testified that he drove into his apartment building parking lot around 2 a.m. on May 30 and parked his car. Two men left a white car in the parking lot next door and approached him. The men pointed guns at him and ordered him to walk to their car. Yohannes identified LaTourette as one of the men and described a silencer attached to his gun. Afraid for his life, Yohannes told them to take his wallet, cell phone and car, and begged them not to shoot him. As they urged him across the parking lot, he dropped his cell phone and car keys. When they arrived at the car, Yohannes refused to get in. LaTourette then hit Yohannes in the head with his gun, breaking off the silencer. Yohannes ran away, shouting for help. He called the police from a nearby gas station. When the police arrived and took him back to his apartment, Yohannes discovered that his car was missing.

Nigel Hoyt testified that he heard a loud car outside his apartment building around 2:30 am on May 30, and went out onto his balcony to investigate. He did

not recognize the white car backing into a parking space beneath his balcony. When the two people in the car did not get out, Hoyt went back into his apartment. Approximately 5 minutes later he heard someone yell for help. Hoyt went out onto his balcony but saw nothing at first. Then he saw a person wearing a black leather jacket with something in his hands rush over from the parking lot next door and put something inside the white car. The person went back and forth across the parking lot a couple of times and then had a conversation with another person who had just come around the corner. The person in the black leather jacket came back to the white car and drove it out of the parking lot. Hoyt wrote down part of the license plate. Later, when the police took Hoyt to view two men and a car, Hoyt recognized the car and driver, although he was no longer wearing the black leather jacket. At trial, Hoyt identified LaTourette as the driver.

LaTourette testified that he was a cocaine addict and had given Austin Derby \$100 and a digital camera to buy cocaine for him. When Derby returned with only \$10 of cocaine, LaTourette was angry and told Derby to call the dealer. Derby called "Oz," and LaTourette grabbed the phone and began shouting that Oz should remedy the problem. Oz refused to speak to LaTourette and hung up when he called back. LaTourette and Derby drove to Oz's apartment and parked next door to wait. When Oz arrived, LaTourette and Derby approached him and LaTourette demanded his money. As Oz walked away toward the street, LaTourette said he would follow Oz around every day and interrupt his drug deals until Oz gave him money or drugs. Oz then took a swing at him. LaTourette

punched Oz lightly in the side of the head. Oz ran away. Because LaTourette intended to come back and harass Oz the next day, he turned back to his own car. When he realized that Derby had taken Oz's car, LaTourette drove his own car after Derby. LaTourette flashed his lights until Derby stopped the car. Derby got back into LaTourette's car and told him that he had retrieved LaTourette's camera.

Police officers testified that they found two knives and an expandable baton on LaTourette and two cell phones and a digital camera belonging to Yohannes in LaTourette's car.

The jury found LaTourette guilty as charged and found that he was armed with a deadly weapon during the commission of each crime. The trial court imposed a standard range sentence as well as firearm enhancements for each count. LaTourette appeals.

Sufficiency of the Evidence

LaTourette first contends that the State failed to present sufficient evidence to sustain the robbery conviction. Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, it allows any rational trier of fact to find all of the elements of the crime charged beyond a reasonable doubt.¹ A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it.²

To convict LaTourette of first degree robbery, the State had to prove

¹ State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

² State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

beyond a reasonable doubt that: (1) he unlawfully took personal property from Yohannes; (2) LaTourette intended to commit theft of the property; (3) the taking was against Yohannes's will by LaTourette's use or threatened use of immediate force, violence or fear of injury; (4) LaTourette used that force to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and (5) LaTourette displayed a firearm or other deadly weapon in the commission of these acts.³

LaTourette first claims that the State failed to produce any evidence that LaTourette actually took Yohannes's property. He claims that Hoyt testified that one person carried items to the white car and the other person later returned to drive the car. Thus, the only reasonable conclusion supported by the evidence is that Derby picked up Yohannes's cell phone and keys. But our review of the record reveals that Hoyt testified: (1) he observed the driver from a distance of about 10 feet and described his medium length hair and black leather jacket; (2) he saw the driver carrying items; (3) he identified the driver for the police based on general characteristics such as hairstyle, height, weight and build; (4) he identified LaTourette as the driver; (5) he did not get a close enough look at the passenger to see more than his short hair; and (6) he could not say for sure whether the passenger had been wearing a leather jacket. Contrary to LaTourette's claim, Hoyt's testimony supports an inference that it was LaTourette who picked up Yohannes's cell phone and keys before returning to drive his own

³ RCW 9A.56.190; RCW 9A.56.200(1)(a)(ii); Instruction 7.

car out of the parking lot.

He next claims that the State failed to prove (1) that he intended to commit theft of the property, and (2) that he used force to obtain, retain, or overcome resistance to the taking of Yohannes's property. He claims that the evidence demonstrated that he was not interested in Yohannes's property. But LaTourette admitted that he demanded money or drugs from Yohannes despite the fact that he was not certain whether it was Derby or Yohannes that had cheated him. And Yohannes testified that he dropped his cell phone and keys as he was forced across the parking lot because LaTourette was pointing a gun at him and then ran away after LaTourette hit him. Coupled with Hoyt's testimony indicating the driver put items into his car and the discovery of Yohannes's cell phones and camera in LaTourette's car, this evidence would allow a rational jury to conclude beyond a reasonable doubt that LaTourette intended to take property from Yohannes and used force to cause him to abandon his property and leave the vicinity.⁴

LaTourette also argues that the State failed to present sufficient evidence to support a conviction of attempted kidnapping. Relying on his previous arguments regarding the sufficiency of the evidence of robbery, he challenges the jury's finding by special verdict that he attempted to kidnap Yohannes to facilitate a robbery. But as discussed above, when viewed most favorably to the State, the evidence would allow a rational trier of fact to find all of the elements of robbery

⁴ See, e.g., State v. Stearns, 61 Wn. App. 224, 230, 810 P.2d 41 (1991) (where defendant ignored property dropped by victim as he dragged her along but returned to the property immediately after victim ran away, rational trier of fact could conclude defendant used force with intent to take property).

beyond a reasonable doubt. Thus, LaTourette fails to identify any error in the kidnapping conviction.

Post Trial Motions

LaTourette next challenges the trial court's decision to proceed with sentencing before deciding his motion for a new trial under CrR 7.5. He claims the trial court abused its discretion by simply passing his motion to the appeal rather than following the express rule that such claims "shall be disposed of before judgment and sentence."⁵ But a review of the record reveals that the trial court repeatedly continued the sentencing hearing until eleven months after the entry of the jury's verdict on December 9, 2005. During that time, defense counsel filed and withdrew a motion for a new trial, the trial court granted LaTourette's motion to proceed pro se, LaTourette indicated his desire to file various motions, and the trial court granted several motions to continue and LaTourette's request for appointment of standby counsel. At the sentencing hearing on November 9, 2006, LaTourette, who had yet to properly serve or file his pleadings, requested additional time to set his motions for hearing. The trial court denied his request, stating, "We are a year or so post-trial, post-verdict, and for whatever reason, all of this is not bringing us to any conclusion on anything The issues that you're raising, Mr. LaTourette, are ones that are well considered in an appellate court."

We will not disturb the trial court's exercise of discretion in denying a

⁵ CrR 7.5(e).

motion for a continuance without a showing of prejudice, or that the result of the proceeding would have been different if the motion had been granted.⁶ LaTourette fails to make any such showing here. Any matters in the record may be properly raised on direct appeal. To the extent he intended to raise matters outside the record, he may file a personal restraint petition.⁷ LaTourette fails to demonstrate any abuse of discretion.

Same Criminal Conduct

LaTourette next challenges the trial court's decision to count each of his three crimes as a separate offense for the purposes of his offender score, arguing that his crimes involved the same criminal conduct. Current offenses are counted separately in determining the offender score unless the crimes "encompass the same criminal conduct."⁸ "Same criminal conduct" means the crimes require the same criminal intent, are committed at the same time and place, and involve the same victim.⁹ We review a trial court's determination of what constitutes the same criminal conduct for abuse of discretion or misapplication of the law.¹⁰

LaTourette and the State agree that the attempted kidnapping, robbery and assault all involved the same time, place, and victim. They disagree regarding criminal intent. The question is whether LaTourette's intent, viewed objectively, changed from one crime to the next or whether one crime furthered another.¹¹

⁶ State v. Kelly, 32 Wn. App. 112, 114, 645 P.2d 1146 (1982).

⁷ State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

⁸ RCW 9.94A.589(1)(a).

⁹ Id.

¹⁰ State v. French, 157 Wn.2d 593, 613, 141 P.3d 54 (2006).

LaTourette contends that the assault furthered the attempted kidnapping because LaTourette only struck Yohannes after he refused to get into the car. LaTourette argues that, as in State v. Taylor, 90 Wn. App. 312, 321-22, 950 P.2d 526 (1998), where an assault is committed in the course of a kidnapping to persuade the victim to not resist the abduction, and no other evidence suggests any other assaultive behavior that did anything beyond facilitating and furthering the abduction, the evidence supports only a finding that the offenses were a part of the same criminal conduct. The State concedes that the assault was intended to overcome Yohannes's resistance to getting into the car, shared the objective intent to abduct Yohannes, and furthered the attempted kidnapping. We accept the State's concession and agree that this record supports only a finding that the assault and attempted kidnapping were the same criminal conduct.

LaTourette next argues that the jury's finding by special verdict that he committed the attempted kidnapping to facilitate the robbery demonstrates that these two crimes also constitute the same criminal conduct. The State concedes that these two crimes constitute the same criminal conduct because LaTourette's use of force in the attempted kidnapping by pointing a gun at Yohannes's head led to him dropping his keys, which allowed LaTourette to steal the property. We also accept this concession.

LaTourette also argues that the assault and the robbery involve the same criminal conduct because the attempted kidnapping facilitated the robbery and the

¹¹ State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987).

assault was merely part of the attempted kidnapping. But the State argues that the assault and the robbery did not involve the same objective criminal intent and the assault did not further the robbery. We agree. In assaulting Yohannes, LaTourette intended to facilitate the abduction but his intent in the robbery was to steal property. By the time of the assault, Yohannes had already dropped his keys and cell phone, so the assault did not further the robbery.¹²

In sum, we hold that LaTourette is entitled to resentencing with the attempted kidnapping and the robbery constituting the same criminal conduct and the assault and the attempted kidnapping constituting the same criminal conduct. We therefore remand for resentencing.

Sentencing Enhancement

Finally, LaTourette contends that the trial court violated his right to a jury trial by imposing a firearm sentencing enhancement when the jury returned only special verdicts finding that he was armed with a deadly weapon during the commission of each crime. In Blakely v. Washington,¹³ the United States Supreme Court held that the jury must find the existence of facts upon which a defendant's sentence is increased. In State v. Recuenco,¹⁴ our Supreme Court found a Blakely violation when the judge imposed a firearm enhancement upon

¹² See, e.g., State v. Lessley, 118 Wn.2d 773, 827 P.2d 996 (1992) (objectively viewed, defendant's criminal intent changed when he completed burglary and moved on to kidnapping; the former did not further the latter).

¹³ 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

¹⁴ State v. Recuenco, 154 Wn.2d 156, 160, 162-63, 110 P.3d 188 (2005) (Recuenco I), rev'd on other grounds, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (Recuenco II).

the jury's return of a "deadly weapon" special verdict.

The United States Supreme Court accepted review of Recuenco I and held that because the failure to submit a sentencing factor to the jury was not a structural error,¹⁵ a Blakely error may be subject to a harmless error analysis. On remand, the Washington Supreme Court decided that harmless error analysis did not apply because "no error occurred in the jury's determination of guilt"¹⁶ The court stated that the error occurred when the trial judge imposed a sentence "for something the State did not ask for and the jury did not find."¹⁷ Therefore, the court did not decide whether a Blakely error could ever be harmless under a state constitutional analysis.

In State v. Williams-Walker,¹⁸ the court reviewed three consolidated cases where the trial court imposed a five-year firearm enhancement after the jury was instructed and asked to find by special verdict whether the defendant was armed with a deadly weapon. In two of the cases the defendant was convicted of first degree assault with a firearm, a conviction requiring a finding that a firearm was used. The court held that the trial court erred because it imposed a firearm enhancement without a specific special verdict finding. The court reasoned that looking to the underlying guilty verdict to support the sentencing enhancement would violate a defendant's right to a jury trial under article 1, sections 21 and 22

¹⁵ Recuenco II, 548 U.S. at 222.

¹⁶ State v. Williams-Walker, 167 Wn.2d 889, 900, 225 P.3d 913 (2010) (quoting State v. Recuenco, 163 Wn.2d 428, 441, 180 P.3d 1276 (2008) (Recuenco III)).

¹⁷ Recuenco III, 163 Wn.2d at 442.

¹⁸ 167 Wn.2d 889, 225 P.3d 913 (2010).

of the Washington Constitution.¹⁹ Because the error occurred during sentencing and not during the jury's determination of guilt, harmless error analysis did not apply.²⁰

This case cannot be distinguished from Williams-Walker. The jury found by special verdict that LaTourette was armed with a deadly weapon and did not find that he was armed with a firearm. The trial court only had statutory authority to impose the deadly weapon enhancements and not the longer firearm enhancements.

Statement of Additional Grounds for Review

LaTourette essentially repeats counsel's challenge to the sufficiency of the evidence in his pro se statement, with an additional claim that the State failed to present sufficient evidence to disprove his self-defense claim. Because the trial court did not instruct the jury on self defense, this argument fails.

Next, LaTourette claims that the information was insufficient to support the charges. In particular, he argues that the certification of probable cause demonstrates that the State had no evidence to suggest that he took property from Yohannes's person or in his presence. But the certification alleged sufficient facts to suggest that LaTourette used force or fear to cause Yohannes to abandon his property and leave the area.²¹ The information set out the essential elements of the offense of robbery and adequately apprised LaTourette of the nature of the charge so that he was able to prepare a defense.²²

¹⁹ Williams-Walker, 167 Wn.2d at 900.

²⁰ Williams-Walker, 167 Wn.2d at 901.

²¹ See, e.g., Stearns, 61 Wn. App. at 230.

²² State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991).

LaTourette enumerates 16 complaints against his trial attorney. To establish a claim of ineffective assistance of counsel, LaTourette must show that counsel's performance fell below an objective standard of reasonableness and that prejudice resulted from the deficiency.²³ If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for an ineffective assistance claim.²⁴ To demonstrate prejudice, LaTourette must show that there is a reasonable probability that the result of the proceeding would have been different but for counsel's errors.²⁵ "A reasonable probability is a probability sufficient to undermine confidence in the outcome."²⁶

First, LaTourette claims his attorney should have requested dismissal based on the inadequate information. But as mentioned above, the information was not inadequate. Next, he contends counsel failed to conduct adequate pre-trial review of documentary evidence, namely (1) the police report; (2) Yohannes's statement to the police; (3) Hoyt's statement to the police; (4) the officers' field notes; and (5) the master evidence log. According to LaTourette, proper examination of these documents would have led counsel to challenge the information, discredit witnesses and discover that Detective Garske found a "live round" from a 9 mm gun in the glove compartment of his car. To the extent LaTourette's argument is based on counsel's tactical choices regarding cross-

²³ Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987).

²⁴ State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

²⁵ Thomas, 109 Wn.2d at 226.

²⁶ Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 694).

examination of witnesses on details of out-of-court statements, it fails. Moreover, the information was proper. And not even the prosecutor knew of Detective Garske's evidence until the morning of trial. LaTourette fails to demonstrate prejudicial error.

LaTourette complains that counsel failed to investigate the physical evidence, such that he failed to present forensic expert testimony to refute Yohannes's claim that he was hit in the head with a gun. But counsel made a reasonable tactical decision to treat Yohannes's story as incredible and focus on the State's failure to produce any guns rather than highlight Yohannes's claim with serious scientific analysis.

LaTourette contends that counsel failed to properly investigate the criminal background of the State's witnesses and their potential drug use at trial. In particular, he states that Yohannes is a drug dealer with a criminal record and Hoyt may be one of his clients. But LaTourette's speculation on these issues does not demonstrate deficient performance, and the trial court's rulings limited inquiry into Yohannes's drug dealing.

LaTourette complains that counsel failed to interview potential defense witnesses and failed to adequately consult with him before trial. To the extent these claimed errors rely on matters outside the record they are not properly before this court. He also argues that counsel failed to properly impeach Officer Mann, Yohannes, and Hoyt with the police reports and Officer Mann's pre-trial hearing testimony, and failed to effectively cross-examine the State's witnesses.

Our review of LaTourette's briefing reveals that these complaints involve tactical decisions and matters outside the record. The record reveals that defense counsel cross-examined every State witness.

LaTourette claims that his attorney failed to present his self-defense claim, failed to present any meaningful defense, argued for the State's case, and undermined his credibility. But our review of the record indicates that defense counsel presented and argued pre-trial motions, cross-examined witnesses and competently argued for acquittal in closing. LaTourette's disagreement with counsel's strategy and disappointment with the results do not establish deficient performance.

Finally, he argues counsel was ineffective in failing to object to the State's introduction of the knives, baton and the 9 mm "live round," and that counsel's cumulative errors require reversal. But the trial court admitted the knives and baton in spite of defense counsel's arguments against admission. Even if counsel failed to articulate a meritorious objection to the live round, LaTourette cannot establish prejudice from such an error or cumulative error. Defense counsel focused on the State's failure to present evidence of LaTourette's motive to commit the charged crimes or the guns that Yohannes claimed to see. Yohannes said nothing about knives or a baton and could not identify the caliber of the gun. Given the evidence presented, defense counsel could legitimately argue to the jury that these items didn't support the State's case. In view of the entire record, LaTourette fails to establish ineffective assistance.

LaTourette describes ten instances of prosecutorial misconduct. To prevail on a claim of prosecutorial misconduct, he must show both improper conduct and prejudicial effect.²⁷ “[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.”²⁸ Prejudice is established only if there is a substantial likelihood the . . . misconduct affected the jury’s verdict.”²⁹

First, LaTourette’s claim that the prosecutor filed a frivolous information fails because the information was proper. Next he claims the prosecutor deceived the court in order to introduce the knives and baton as evidence and then repeatedly displayed them to appeal to the passions of the jury. But the prosecutor did not claim that any witness would testify that LaTourette used the knives; rather, the prosecutor argued that the fact that the knives and baton were found on LaTourette’s person at the time of arrest indicated that he was armed and ready to do damage at the time of the kidnapping. The trial court admitted the evidence and the prosecutor argued only that the weapons were relevant to motive. This was not misconduct.

LaTourette next contends the prosecutor made false and misleading statements and knowingly presented perjured testimony and appealed to the passions of the jury in argument. In particular, he claims the prosecutor argued

²⁷ State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

²⁸ State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

²⁹ Roberts, 142 Wn.2d at 533 (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).

that the evidence did not establish that Yohannes was a drug dealer when he knew Yohannes had admitted in a deposition to dealing marijuana. LaTourette also contends that the prosecutor knew Yohannes's and Hoyt's testimony differed from their previous statements to police. But our review of the record reveals that the prosecutor properly argued the evidence before the jury. And minor inconsistencies between unsworn statements to police and testimony under oath do not demonstrate perjury.

Also, LaTourette claims that the prosecutor assumed facts not in evidence and improperly attacked his character during cross-examination and closing argument. Defense counsel actually objected to one of the prosecutor's questions. The prosecutor asked, "And the real truth about all of this is that you got hired to kidnap Mr. Yohannes, didn't you?" Defense counsel did not elaborate on his objection but it was presumably grounded in the trial court's pre-trial ruling excluding any reference to Derby's withdrawn statement that he and LaTourette had been hired to kidnap Yohannes. But LaTourette answered immediately, denying the accusation, and defense counsel did not request a ruling or limiting instruction. LaTourette fails to articulate how this single suggestion that he was hired to kidnap Yohannes created an enduring prejudice that could not have been cured by a limiting instruction. Similarly, a review of the record of the prosecutor's closing reveals proper argument. LaTourette fails to establish his claim of cumulative error.

Finally, LaTourette claims that the trial court abused its discretion on

various rulings, depriving him of a fair trial. Because the information was proper, we reject his claim that the trial court erroneously allowed the filing of a frivolous information. Similarly, given his failure to establish prosecutorial misconduct, we reject his contention that the trial court abused its discretion by failing to control the prosecutor. He also contends the trial court improperly admitted into evidence the knives, the baton, and the “live round,” based on improper personal bias and without proper foundation. But the record reveals that the trial court reasonably admitted these items based on the State’s argument that they could demonstrate an intent to use force. LaTourette fails to demonstrate any abuse of discretion in the trial court’s decisions on the evidence.

LaTourette also claims the trial court abused its discretion by failing to decide his 16 pro se post-trial motions, including a motion for a new judge, a motion for access to discovery and records of trial proceedings, as well as motions for a new trial and to dismiss. But as discussed above, the trial court did not abuse its discretion by proceeding to sentencing after LaTourette failed to properly file or note for hearing his various motions for 11 months following the entry of the verdict.

Next, LaTourette contends that his right to be present at sentencing was violated when the trial court amended the judgment and sentence by reducing the confinement ordered on count II by 44 months in order to comply with RCW 9.94A.533(3)(e) and (g), which provide that firearm enhancements may not result in a sentence beyond the statutory maximum. We disagree. Because the

confinement imposed in count I was greater than that originally imposed in count II and was to run concurrently with count II, there was nothing LaTourette could have said to change the result had he been present. Therefore this was not a critical stage of the proceedings at which he had a right to be present.

Finally, LaTourette contends that the trial court erred by denying his motion for new counsel. But the record reflects that the trial court denied the motion to replace trial counsel with new counsel because LaTourette failed to make any showing that counsel had divided loyalties or had not represented him well at sentencing. Given this record, LaTourette fails to establish abuse of discretion.

Affirmed in part and remanded for resentencing.

Leach, A.C. J.

WE CONCUR:

Appelwick, J.

Grosse, J.